



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1700

STATEMENT OF CHERYL NIRO

**Incoming Member, Standing Committee on Medical
Professional Liability**

Member, House of Delegates

On Behalf of the

AMERICAN BAR ASSOCIATION

Before the

Subcommittee on Health

Committee on Energy and Commerce

United States House of Representatives

Concerning

INNOVATIVE SOLUTIONS TO MEDICAL LIABILITY

July 13, 2006

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to present the views of the American Bar Association (ABA) on "Innovative Solutions to Medical Liability." My name is Cheryl Niro, and I am an incoming member of the Standing Committee on Medical Professional Liability and a member of the House of Delegates of the ABA. I am appearing on behalf of the ABA at the request of its President, Michael Greco.

I was an early proponent of alternative dispute resolution and sought the best education possible in the areas of mediation, negotiation and arbitration. I have been certified and trained by the founders of these fields. I began at The Atlanta Justice Center, one of the first three mediation programs in the nation. I was a student and teaching assistant at the Harvard Law School mediation and negotiation training programs.

In 1992, I was a founding director of a dispute resolution training program funded by a joint grant from the US Departments of Education and Justice. That program became the National Center for Conflict Resolution Education and trained thousands of educators, teachers, parents and students to create Peer Mediation Programs in schools and other youth-serving organizations across the country.

I have served on the ABA Section of Dispute Resolution Council and have conducted skills-based training programs for hospital professionals so that they may use these skills to resolve medical care disputes cooperatively with patients and their families. I have never filed a plaintiff's medical malpractice claim in my career.

I testify here today as a proud representative of the ABA, a lawyer interested in improving our legal system and an American citizen committed to our tradition of fairness and justice.

For decades the ABA has supported the use of, and experimentation with, voluntary alternative dispute resolution techniques as welcome components of the justice system in the United States, provided the disputant's constitutional and other legal rights and remedies are protected. The ABA strongly supported the alternative dispute resolution movement in the United States through Committees and in 1993 it created a Section of Dispute Resolution. The Section promotes efforts that focus on education, experimentation and implementation of alternatives to litigation that resolve disputes economically and without taxing limited courtroom resources.

As a result of the work of our Dispute Resolution professionals, and leaders in that field across the country, the number of courts utilizing these methods increases daily. Successful programs are replicated, new understanding of the potential offered by these voluntary processes is achieved, and greater numbers of judges, lawyers and clients find these alternatives acceptable tools with which legal disputes may be resolved. Over the past fifteen years, the ABA has contributed significantly to the development of the field by creating ethical standards, best practices training and scholarship to this emerging practice. Additionally, the ABA House of Delegates has adopted policy directed at ensuring the efficacy and integrity of these voluntary alternatives to litigation.

Mediation, by definition, is a voluntary process whereby disputants may work together, with the assistance of a trained neutral facilitator, to resolve their dispute.

Mediation, as it is known and practiced worldwide, is not a mandatory process. Where disputants are compelled to mediate, the compulsion is only to engage in a mediation process in good faith. Agreements cannot be compelled. Likewise, the ethical use of arbitration requires that parties knowingly agree to engage in the process.

Specific to the area of medical malpractice, the ABA endorses the use of voluntary negotiation, mediation, and settlement agreements. In addition, the ABA recognizes the use of arbitration as an option for resolving these types of disputes under circumstances whereby the agreement to arbitrate is entered into only on a voluntary basis after a dispute has arisen and only if the disputant has full knowledge of the consequences of entering into such an arrangement.

The American Bar Association has reviewed, as part of ongoing efforts to improve the operation of our legal system, proposals related to the area of liability of health care providers. One such proposal is the creation of “health courts.” Under the proposed “health court” system, an administrative agency would oversee the operation of specialized “courts” where medical malpractice cases would be heard by persons possessing experience in the health care field rather than judges and juries. Under this proposal, medical negligence litigation cases would be removed from the court system and the protection of the time-tested rules of procedure and evidence. The parties would be allowed to be represented by attorneys. There would be no juries. Expert witnesses would be hired by “health courts,” not by the injured patient. Injured patients would be compensated according to a schedule of awards. Patients injured by medical negligence would be denied the right to request a trial by jury and the right to receive full compensation for their injuries.

Proponents of the “health courts” proposal say it is modeled on the Workers’ Compensation system. But there are major differences between the two systems. It is unlike the Workers’ Compensation system in that injured patients would still be required to prove fault on the part of a defendant. A similar burden to prove fault is not imposed on an injured worker in a Workers’ Compensation case. Importantly, the Workers’ Compensation system balances the loss of the right to bring an action in court with a guaranteed award that is not fault-based. In the “health court” scheme, injured patients are forced to give up the right to bring an action in a court with no guarantee of an award. Injured patients would be required to prove that their injuries are “the result of a mistake that should have been prevented.” Proponents call this the “avoidability standard,” which includes injuries “that would not have happened were optimal care given.” This is not a “no fault” standard as in the Workers’ Compensation field, nor is it a strict liability standard.

The “health court” scheme and other proposals for administrative tribunal schemes also include the creation of a schedule for the assessment of damages and would cover both economic and non-economic damages. Such a schedule is inappropriate in medical malpractice cases where a fixed, rigid assessment would treat all patients with similar injuries the same. Would it be fair to award a pre-determined award for negligence that results in a paralyzed hand for a surgeon, or the loss of vision for an artist? The plan assumes that consensus would produce an annually adjusted schedule based upon research on similar schedules in the U.S. legal system and abroad. Proponents urge the comparison to Sweden and Denmark for regularizing the value of American injuries. The efficacy of that approach is doubtful, because those nations have

health and welfare benefits that are paid for by their governments before consideration of the injury claim take place.

By establishing a schedule of injuries/pay-outs, the “health court” scheme would impose a de facto cap on non-economic damages in injury claims. The plan contemplates Presidential and congressional appointees to establish the schedule, but there is no guarantee that the Commission would be balanced, nor that the schedule would provide fair and just compensation for the injured patients. Caps on non-economic damages work to the disadvantage of women, children and the elderly. Thirteen states have found caps unconstitutional. Courts and juries have a long tradition of fashioning individualized, customized damage awards to fit the unique circumstances of each case.

Thus, in February, 2006, the ABA adopted as policy the following resolution:

RESOLVED, That the American Bar Association reaffirms its opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action.

RESOLVED, That the American Bar Association recognizes that the nature and extent of damages in a medical malpractice case are triable issues of fact (that may be decided by a jury) and should not be subject to formulas or standardized schedules.

FURTHER RESOLVED, That the ABA opposes the creation of health care tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.

The ABA firmly supports the integrity of the jury system, the independence of the judiciary and the right of consumers to receive full compensation for their injuries, without any arbitrary caps on damages. It is for these reasons that the ABA opposes the creation of any “health court” system that undermines these values by requiring injured

patients to utilize “health courts” rather than utilizing regular state courts in order to be compensated for medical negligence.

As stated above, ABA policy has long endorsed the use of alternatives to litigation for resolution of medical malpractice disputes only when such alternatives are entered into on a voluntary basis and only when they are entered into after a dispute has arisen. Instead of creating and mandating the use of “health courts,” the ABA advocates the use of voluntary arbitrations, mediations, and settlement conferences, all of which are appropriate means of alternative dispute resolution.

There are exciting new programs that demonstrate the efficacy of the use of alternative methodologies. One such program is at the Rush Presbyterian Hospital in Chicago, run by former judges and personal friends of mine. The Rush Mediation Program has successfully resolved more than 80% of filed claims. It is a voluntary and confidential mediation program. The mediator has no power to force the parties to agree on settlement. The mediator (or team of two mediators) has no interest in the outcome and is purely neutral. The program has demonstrated that voluntary mediation can save money for all parties, save time, settle cases and preserve the patient’s right to a trial by jury.

Our legal system, the most respected in the world, has procedural safeguards that have evolved over centuries. The proposals for “health courts” contain little information on how the system would actually work. Unanswered are questions about how patients would obtain information and/or what kind of discovery would be permitted. The plan does specify that the “health court,” not the injured patient, would hire expert witnesses, which is another departure from current practice. It appears that health care providers get

an “opt in” opportunity, but patients have no corresponding right to “opt out.” Patients may be in the position of being forced to sign agreements to use the “health court” with their HMO or health care provider before they receive treatment. More information is clearly required to obtain any clarity on the basic fairness that may be present or lacking under the “health courts” proposal.

I would be remiss if I did not mention the obvious problem contained within our Constitution in the Seventh Amendment. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in a Court of the United States, than according to the rules of the common law.” Proponents argue that because the Workers’ Compensation system is Constitutional, that the “health courts” proposals would be as well. The problem with this reasoning, as pointed out above, is that the Workers’ Compensation system was effectively balanced in providing a certain award without the burden of establishing that a mistake has been made that should have been prevented. The schedule of benefits may also be found unconstitutional if it is deemed to be caps on damages in disguise.

Proponents of “health courts” argue that juries are not capable of understanding medical malpractice cases. There is no evidence that this is the case. In fact, empirical studies have demonstrated that juries are competent in handling medical malpractice cases. Duke University School of Law Professor Neil Vidmar’s 1995 extensive study of juries found that:

[o]n balance, there is no empirical support for the propositions that juries are biased against doctors or that they are prone to ignore legal and medical standards in order to decide in favor of plaintiffs with severe injuries. This evidence in fact indicates that there is reasonable concordance between jury verdicts and doctors' ratings of negligence. On balance, juries may have a slight bias in favor of doctors.¹

In addition, he concludes at page 259 of his 1995 publication that research “does not support the widely made claims that jury damage awards are based on the depth of the defendants’ pockets, sympathies for plaintiffs, caprice, or excessive generosity.” A survey of studies in the area by University of Missouri-Columbia Law Professor Philip Peters, Jr., published in March 2002 likewise found that:

[t]here is simply no evidence that juries are prejudiced against physician defendants or that their verdicts are distorted by their sympathy for injured plaintiffs. Instead, the existing evidence strongly indicates that jurors begin their task harboring sympathy for the defendant physician and skepticism about the plaintiff.²

A May 2005 Illinois study conducted in my home state by Professor Vidmar also concluded that there was no basis for the argument that runaway verdicts were responsible for increases in malpractice premiums.³

Our legal system has served our nation well. Our lawyers and judges have been protecting the Constitution and the rights it contains, and have made our democracy the

¹ Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets and Outrageous Damage Awards* 182 (Univ. of Michigan Press 1998) (1995).

² Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 934 (2002).

³ Neil Vidmar, *Medical Malpractice and the Tort System in Illinois*, 93 ILLINOIS BAR JOURNAL 340 (2005). The complete study may be found at this link: <http://www.isba.org/medicalmalpracticestudy.pdf>

envy of the world. As a bar president, I have had the opportunity to visit nations where lawyers do not have the role and function of the American lawyer. I have been to Zimbabwe and Zambia, and witnessed first-hand countries where citizens can have no expectation of fairness, justice or equal treatment. I have seen the result of decades of unchecked power in the hands of leaders more interested in their own wealth than the well-being of their nations. Our system is not perfect, but our founders understood that perfection in human endeavor is not likely to be possible. I believe that is why our Constitution speaks of our national mission to create a union that is always trying to be more perfect, closer to the ideal. It is our legal system, our Constitution and our steadfast adherence to the rights of our citizens that make ours a nation of hope above all others. Lawyers strive every day to do their best work to achieve justice. Legislators have a similar duty to create laws that will produce just outcomes.

In accordance with our duty to preserve and protect our system of justice, the ABA opposes the “health courts” proposal currently being discussed. We support the use of alternatives to litigation in medical malpractice cases only when such alternatives are entered into on a voluntary basis, and only when they are entered into after a dispute has arisen. We also oppose the Workers’ Compensation model in medical malpractice cases as proposed, because an injured patient loses the right to bring an action in court, but receives no guaranteed award.

Injured patients and health care providers have access to a respected court system and fair processes to resolve disputes. Any proposal that would deny access to that court system should offer a better system than our current civil justice system. The “health courts” proposal fails to meet that standard and it should be rejected.

Thank you for the opportunity to appear before you today to present the views of the American Bar Association. I would be happy to answer any questions you may have.